

1 people here to leave.

2 I don't know who everyone is, or
3 what their status is under the protective
4 order. But I'd be grateful if you could - if
5 we could move forward on that basis, and ask
6 those folks who are not entitled to hear
7 confidential and highly confidential
8 information to leave the courtroom.

9 JUDGE SIPPEL: All right. I'm
10 going to have to do that. And the reason is
11 because I can't have a situation where we are
12 excusing people while he reads a sentence
13 that's got privileged matter in it then goes
14 back - the door is going to be opening and
15 closing. That just can't work. I'm terribly
16 sorry about that.

17 Anybody here who has not signed
18 the protective order is going to have to leave
19 the courtroom at this point.

20 Let's go off the record.

21 (Whereupon at 10:18 a.m. the
22 proceeding in the above-entitled matter went

1 off the record to return on the record at
2 10:19 a.m.)

3 JUDGE SIPPEL: All right, we are
4 back on the record. Miss Reporter, are we all
5 set?

6 Your witness.

7 DIRECT EXAMINATION

8 BY MR. LEVY:

9 Q Mr. Hawkins, would you state your
10 name for the record?

11 A Frank Hawkins.

12 Q And you have been an NFL
13 executive, or you were an NFL executive, for
14 a substantial part of your career?

15 A I was an NFL executive for 15
16 years, from 1993 until last summer, June,
17 2008.

18 Q And what were your
19 responsibilities in the NFL?

20 A A variety of responsibilities
21 including finance, policy matters, but most
22 germane to this proceeding, media policy

1 matters. At various times I negotiated NFL
2 television contracts. I worked on NFL media
3 policies, where NFL games and other
4 programming were to be distributed. And I
5 ended as media strategist for the NFL,
6 basically to look forward and figure out where
7 in light of technological changes and
8 marketplace changes NFL games ought to be
9 distributed.

10 Q And how are you currently
11 employed?

12 A I am a partner in a consulting
13 firm that I formed last summer with two
14 friends.

15 Q I want to spend just a few minutes
16 summarizing your written testimony that you
17 have in front of you.

18 MR. LEVY: Your Honor, I don't
19 know what the appropriate protocol is for
20 offering that testimony, but may I ask Mr.
21 Hawkins if it is true and correct to the best
22 of his knowledge and belief?

1 JUDGE SIPPET: Yeah, it's already
2 been marked and received into evidence. So
3 just refer him to the document.

4 MR. LEVY: Fair enough; then I
5 don't need to do that.

6 BY MR. LEVY:

7 Q Mr. Hawkins, let's start with,
8 what is the NFL Network?

9 A The NFL Network is a cable
10 channel. You get it at some channel position
11 on your dial. I think in Washington, assuming
12 that you live in Washington, it's something
13 like channel 275, and available only on a
14 sports tier.

15 And it consists of football-
16 related programming; not just NFL, but
17 football-related programming, 24 hours a day,
18 seven days a week. It includes news
19 programming - football news. It includes
20 insider access type of programming. For
21 example reports from NFL owners' meetings and
22 the like. It includes football analysis

1 programming, leading up to the draft which is
2 going to occur in a couple of weeks, analysis
3 of what each NFL team needs in terms of draft
4 picks to fill in its roster. And who's
5 available that might meet those criteria. It
6 includes analysis during the season of
7 football teams, how they are doing, are they
8 living up to expectations, et cetera.

9 And it also includes a package of
10 eight games in the last half of the NFL
11 season, prime time games that we would call,
12 when I was at the NFL, quote, representative,
13 close quote, NFL games, which means a mix of
14 games, some top notch, some medium, some
15 lesser tier.

16 Q Does the NFL Network also seek to
17 license programming from other providers,
18 program providers?

19 A Yes.

20 Q Can you give us an example?

21 A As I said the NFL network includes
22 programming oriented towards the sport of

1 football generally. So it licenses a couple
2 of college bowl games. It sought to license
3 college football programming. Part of its
4 growth strategy when it was initially formed
5 back in 2004 was to expand into football
6 programming at all levels.

7 It was intended to be a vehicle
8 that helps develop new football fans, and
9 helps develop interest in the sport of
10 American football, generally.

11 Q How many distributors carry the
12 NFL network?

13 A Last I knew about 240.

14 Q Now what is Comcast?

15 A Comcast is a media conglomerate.
16 It's principally a distribution company. It
17 owns a number of cable systems; [REDACTED]
18 subscribers I do believe. Those systems are
19 clustered in a lot of major market areas, with
20 Boston, Chicago, Philadelphia, Washington,
21 D.C., Denver, they control all of the cable
22 systems in those markets.

1 And there are a number of others,
2 I think 22 of 30 NFL markets are Comcast
3 markets. Comcast also has a company, one of
4 its subsidiaries, that includes a channel
5 group, and in that channel group are Versus,
6 Style, E, and the Golf channel among other
7 things, plus minority interests in a variety
8 of other companies.

9 Q Mr. Hawkins, what does the term,
10 tier, mean in the context of cable service?

11 A Tier is a bundle of channels that
12 is available for purchase by a cable customer.
13 These tiers are put together not by the
14 customers themselves, but instead by the
15 distributor, so the first tier, which is
16 required by the federal statute, the '92 Act,
17 is broadcast basic. Sometimes it's called
18 lifeline. It's the broadcast stations only,
19 plus some public educational governmental
20 channels. These were the original cable
21 channels back when cable first started out and
22 was intended principally to help people who

1 couldn't get good TV reception to get better
2 TV reception.

3 Then sort of in the mid-'70s or
4 so, there started to be additional channels
5 that weren't transmitted to the public by
6 broadcast television, but instead were sold to
7 the public only by cable television. And some
8 of these included ESPN, started out in '78 or
9 '79 I believe as the Entertainment and Sports
10 Programming Network.

11 Those channels are included in a
12 tier that's called analog basic or expanded
13 basic. Over the past decade or so I would
14 believe cable television has started to switch
15 cable technologies to digit delivery
16 technology. It requires a different kind of
17 set top box to receive this than old
18 traditional technology, but it allows for much
19 more efficient delivery of programs, or
20 channels. So the digital tier usually
21 includes yet more channels. And there are
22 probably several tiers. Some carriers use

1 specialty tiers; Comcast does, an expanded
2 basic tier, and then keeps adding channels and
3 does broader and broader, quote, basic tiers
4 that are general interest mixes of channels.

5 And finally at the top there are
6 premium services. Some of those premium
7 services are movie channels at the like.
8 Others are specialty tiers that you have to
9 pay extra on top of your basic cable package
10 in order to receive them.

11 Q In 2004 when Comcast first entered
12 into a business relationship with the NFL
13 Network, on what tier did Comcast carry the
14 NFL Network?

15 A It was carried on a tier called
16 D2, which would have been probably the one,
17 two, three, four, the fourth tier that Comcast
18 offered.

19 JUDGE SIPPEL: I'm sorry to
20 interrupt you. I just got a note handed to me
21 that there is a lot of electrical interference
22 from cell phones, apparently cell phones and

1 Blackberries. So it's an opportunity, to just
2 turn off any device. I better check my own to
3 come to think of it. It has to do with the
4 Court Reporter.

5 THE WITNESS: I believe the
6 question was, where did D2 fit in the Comcast
7 hierarchy of tiers. D2 is the - I believe
8 it's the fourth tier. So it starts off with
9 broadcast, then expanded basic, then D1 which
10 is a more broadly distributed tier of digital
11 channels; and then D2; that's where the NFL
12 would have fit.

13 BY MR. LEVY:

14 Q Is D2 a broadly penetrated tier?

15 A Yes, it's fairly broadly
16 penetrated.

17 Q Okay, and at that time, in 2004,
18 on what tier did Comcast carry the national
19 sports networks that it owned?

20 A It carried them on expanded basic,
21 which was the second tier, more broadly
22 distributed.

1 Q Now did there come a time -

2 JUDGE SIPPEL: I'm sorry, what
3 was that called again?

4 THE WITNESS: Expanded basic.

5 JUDGE SIPPEL: Expanded basic,
6 thank you.

7 THE WITNESS: It may be at
8 various times referred to as expanded basic
9 and a large basic during the course of this.
10 Those are the same.

11 BY MR. LEVY:

12 Q Did there come a time when Comcast
13 moved the NFL Network to a different tier?

14 A Yes.

15 Q When was that?

16 A The actual move took place in the
17 summer of 2007.

18 Q When did Comcast announce publicly
19 that it intended to tier the NFL Network?

20 A September, 2006.

21 Q And to what tier did Comcast move
22 the NFL Network?

1 A It was moved to one of the
2 specialty tiers at the very top of the list;
3 that is, the most narrowly distributed. In
4 September, 2006 it announced that it was going
5 to be making the change, just as the NFL
6 Network was seeking to negotiate additional
7 distribution deals just before the games
8 started. But it wasn't going to move them
9 until after the games were over.

10 Q Was Comcast obligated to take
11 those games at a certain price?

12 A The NFL was obligated to offer
13 Comcast the right to take those games at a
14 price not to exceed [REDACTED]
15 [REDACTED]. Comcast had the right to accept or
16 decline that offer.

17 Q And what did Comcast elect to do?

18 A Comcast elected to accept that
19 offer.

20 Q What was the impact on the NFL Net
21 work of Comcast's decision to move it to a
22 narrow premier tier?

1 A The direct impact was that the NFL
2 Network subscribers fell by approximately [REDACTED]
3 [REDACTED] The D2 tier was received by
4 somewhere between [REDACTED] Comcast
5 subscribers; the sports tier to which the NFL
6 Network was relocated was received by fewer
7 than [REDACTED] That has since increased by
8 [REDACTED] the original number of
9 subscribers, because people have bought it
10 since the NFL Network moved there.

11 More important, though, the timing
12 of Comcast's announcement that it was going to
13 move the NFL Network to a tier really created
14 havoc in the marketplace. The NFL Network was
15 attempting to negotiate a lot of additional
16 carriers, which were based on the history of
17 how Turner and ESPN were able to add to
18 distribution after they got NFL games.

19 The NFL had a reasonable
20 expectation that the NFL Network would be more
21 broadly distributed. Those negotiations
22 pretty much stopped in their tracks.

1 JUDGE SIPPEL: Havoc is a pretty
2 strong word. Did it really go that far?

3 THE WITNESS: I would say yes. I
4 would say yes. That's opinion testimony. But
5 it's my opinion, and I'm sure that Mr. Carroll
6 and his witnesses will disagree. But it did
7 disrupt the marketplace very substantially.

8 JUDGE SIPPEL: That's a word in
9 which you are characterizing, it's a word of
10 characterization. I wouldn't see it to be an
11 opinion.

12 THE WITNESS: It is a word of
13 characterization.

14 JUDGE SIPPEL: I got you. Thank
15 you.

16 BY MR. LEVY:

17 Q Mr. Hawkins, we talked some this
18 morning about similarities and differences of
19 the NFL Network and the two networks owned by
20 Comcast, the two national sports networks
21 owned by Comcast, The Golf Channel and Versus.
22 Can you tell us how those networks are similar

1 and different?

2 A The networks are similar in that
3 they are all three sports-focused and as a
4 result they're all focused on attracting a
5 male, 18 to 49 demographic in terms of
6 viewers. They're all focused on attracting
7 advertising from companies that want to reach
8 males 18 to 49, car companies, beer companies
9 and financial services companies, etc.

10 They are also all focused on
11 providing a robust set of programming within
12 their particular network missions. Now the
13 network missions, two of them are single
14 sports. So Golf is going to look for more and
15 better golf programming, Golf Channel. NFL is
16 going to look for more and better American
17 football programming. Versus is going to look
18 for more and better programming of all sports,
19 but they're all competing for the same
20 viewers. Versus and NFL compete for the same
21 programming and all three are competing for
22 the same advertisers with some minor

1 exceptions. Golf is going to have an inside
2 track because it's preaching to golfers on
3 golf equipment, although sometimes that's
4 advertised on other networks as well, other
5 channels as well.

6 MR. CARROLL: Your Honor, may I
7 just note a brief objection? I raised this
8 yesterday. This witness is here as a fact
9 witness not an expert. I don't mind some
10 background to start, but we've not gotten into
11 any personal fact testimony.

12 We just seem to be hearing expert
13 views frankly about my client and about their
14 business. And I think I've no objection to
15 him as a fact witness, but I object very much
16 if he's going to be sitting here giving expert
17 opinions and things that are not based upon
18 his personal knowledge when he was involved.

19 JUDGE SIPPEL: I'm accepting this
20 as testimony of what he has observed over the
21 years. Whether or not he's qualified to reach
22 every conclusion that he's reaching that's a

1 different issue. So I'm not -- But I would
 2 rather just have the witness present it as he
 3 wants to present it as long as it's not a
 4 varying from his role today and you'll have
 5 plenty of opportunity to cross examine.

6 MR. CARROLL: Okay.

7 MR. LEVY: I'm almost done.

8 BY MR. LEVY:

9 Q But, Mr. Hawkins, is there
 10 anything that you've testified to thus far
 11 that's outside the scope of your personal
 12 knowledge?

13 A No, I had a broad scope of duties
 14 at the NFL that included studying all of the
 15 matrix communications companies, media
 16 companies, NBC, Disney, CBS and Comcast.
 17 They are one of the big five.

18 Q Mr. Hawkins, in their trial brief
 19 at least Comcast has suggested that because
 20 there are more live NFL games available on
 21 Direct TV than on Comcast the most avid
 22 professional football fans migrated from

1 Comcast, left Comcast, for Direct TV years
2 ago. Do you recall reading that in the
3 redacted version of the trial brief?

4 A I do.

5 Q Okay. Is that true?

6 MR. CARROLL: Your Honor, I'll
7 just note this is beyond his submitted written
8 statement. There is no mention of this in his
9 offered written testimony. I could cross on
10 it, but it's beyond anything that was
11 submitted.

12 MR. LEVY: Your Honor, I don't
13 frankly recall whether it's within or without
14 the scope of his written testimony, but it's
15 a straightforward factual question. It's my
16 last question and it's a point that we can
17 establish through other witnesses if you
18 prefer.

19 But we had an understanding when
20 we first met to discuss the procedural
21 approach that we're going to use to handle
22 testimony and Mr. Carroll --

1 MR. CARROLL: I'll let it happen.

2 All right.

3 MR. LEVY: -- and Mr. Toscano were
4 the advocates.

5 MR. CARROLL: I'll let --

6 JUDGE SIPPEL: Okay. I just
7 wanted to hear you out. That's fine. Mr.
8 Carroll has mooted the issue. So let's go
9 forward.

10 MR. LEVY: Okay.

11 JUDGE SIPPEL: Do you want him to
12 repeat the question?

13 MR. LEVY: Do you recall the
14 question, Mr. Hawkins?

15 THE WITNESS: Have most avid NFL
16 fans subscribed to Direct TV? I would say
17 that's pretty clearly no. Let me just walk
18 through my math as to why that is the case.

19 In the exhibits that were
20 referenced in my direct testimony, one of them
21 was the ESPN Choten (phonetic) poll on the
22 popularity of sports. It was taken among

1 Americans ages 12 and up. Seventy percent of
2 those people listed themselves as NFL fans.
3 Half of those, about 35 percent, listed
4 themselves as avid NFL fans.

5 If you just do the math, there's
6 like 240 million Americans. You get down to
7 about 80 million Americans who consider
8 themselves to be avid NFL fans under that poll
9 and Direct TV only has about 16 or 17 million
10 subscribers. So there are far avid NFL fans
11 that aren't Direct TV subscribers. Plus
12 relatively few avid NFL fans based on internal
13 NFL research that's done from time to time
14 actually subscribe to Sunday Ticket because
15 it's a special purpose package that people
16 have to pay extra for. You only watch it if
17 you don't have season tickets or if you're a
18 Vikings fan living in Washington, D.C. which
19 was the case with me when I lived here or if
20 you want to follow a lot of games at once, if
21 you are channel surfer. But otherwise a lot
22 of those avid NFL fans are very satisfied with

1 watching the games that are nationally
2 telecast or regionally telecast in their
3 markets.

4 MR. LEVY: Your Honor, that's all
5 I have for Mr. Hawkins.

6 JUDGE SIPPEL: Your witness.

7 MR. CARROLL: Okay, Your Honor.
8 Thank you.

9 CROSS EXAMINATION

10 BY MR. CARROLL:

11 Q Mr. Hawkins, let me start first
12 with a few of the things you said from the
13 stand and then we'll go into your written
14 testimony submission. First of all, I think
15 you testified, one of the first things you
16 said was that the NFL Network is only
17 available in D.C. on a sports tier. Is that
18 right?

19 A On cable, that is correct.

20 Q Yes, that's a big qualification.

21 A Yes.

22 Q If you live in D.C. you can see

1 the NFL Network on Direct TV and Disc
2 Satellite, correct?

3 A You may have to cut down some
4 trees to do it. But yes.

5 Q But you don't dispute the fact
6 that your network is available to satellite
7 subscribers you're happy to have here in the
8 District of Columbia, correct?

9 A That is correct.

10 Q Okay. And let me just touch on
11 your background for just a moment. You're a
12 lawyer, correct?

13 A I was a lawyer originally.

14 Q You used to practice with Mr. Levy
15 at his law firm.

16 A I did. I did not practice with
17 Mr. Levy. Until I took my NFL job, I had
18 almost no contact with Greg surprisingly.

19 Q Okay. But you were at the same
20 firm.

21 A I was.

22 Q Covington and Burling.

1 A I was.

2 Q And after that you went over to
3 the NFL.

4 A Correct.

5 Q Now when you were at that NFL, you
6 were an employee of NFL, not Enterprises,
7 correct?

8 A I was -- Well, there are two
9 questions, payroll and where I had duties. I
10 was actually a vice president and secretary of
11 NFL Enterprises. I was on the NFL payroll and
12 a portion of my pay was actually allocated to
13 NFL Enterprises and reimbursed.

14 Q You see your written statement.
15 Do you have your written statement up there?

16 A Yes.

17 MR. CARROLL: Your Honor, do you
18 have that handy or should we get a copy for
19 you?

20 JUDGE SIPPEL: No, I have it.

21 BY MR. CARROLL:

22 Q Paragraph one says you were

1 employed by the NFL. It doesn't say anything
2 about being employed by NFL Enterprises. Why
3 is that?

4 A Because my paycheck came from the
5 NFL as I just told you.

6 Q Okay. You're not changing what
7 you wrote.

8 A No, not at all.

9 Q That you were an employee of NFL.

10 A Not at all.

11 Q And did you give legal advice to
12 NFL Enterprises and the NFL while you were
13 there to both of them?

14 A Yes, I did at various times.

15 Q And did you give advice to them,
16 for example, with respect to the 2004 contract
17 with my client?

18 A Did I -- I was indirectly involved
19 in that contract.

20 Q Well, you've claimed privilege
21 over your conversations for that period.

22 A Yes.

1 Q Do you remember that?

2 A Yes, I do.

3 Q My colleague asked you questions
4 at a deposition and you kept claiming that you
5 had privileged conversations. So let me ask
6 the question again. Did you give legal advice
7 to the NFL and to Enterprises in connection
8 with the 2004 contract?

9 A Mr. Carroll, a privilege goes both
10 ways. I spoke with someone who is clearly
11 acting as counsel in those circumstances
12 discussing legal matters. I don't know
13 whether I was the client, whether I was a
14 lawyer or whatever. But those were privileged
15 conversations.

16 JUDGE SIPPEL: Well, if they're
17 privileged, then you have to have considered
18 legal advice because you --

19 THE WITNESS: It was clearly legal
20 advice or legal discussion going back and
21 forth and whether I was getting the legal
22 advice or providing it I really don't know.

1 BY MR. CARROLL:

2 Q You're not clear on whether as a
3 lawyer you were giving or receiving legal
4 advice.

5 A Well, Mr. Carroll, all that I
6 would say is that sometimes when you talk with
7 an associate I'm sure that you are engaged in
8 a legal discussion of the same type that I was
9 engaged in with the man who was acting as
10 Enterprises' counsel in direct negotiations at
11 that time.

12 Q With all due respect, I'm just
13 asking about your role.

14 A And I'm just saying that I was the
15 senior lawyer involved and I was approaching
16 this as both business and legal advice.

17 Q Okay. So you were the senior
18 lawyer involved.

19 A The senior of the two people who
20 was a lawyer.

21 Q Okay. So you were the senior
22 lawyer involved having discussions about the